COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1955

No. [redacted]

HULBERT T. E. BEARDSLEY and
H. T. E. BEARDSLEY, INC.,

Petitioners,

v.

CONTINENTAL CASUALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

PAGE

Statement of Case 1

ARGUMENT:

The petition for the writ is without merit. There is no conflict between the decision below and that of other courts of appeals 3

A. A copyright does not subsist in language in the public domain (Copyright Statute, Section 8; 17 U.S.C. Sec. 8) such as language in common use in insurance or other legal forms 3

B. Indirect Infringement 5

C. Forfeiture 5

Conclusion 6

CASES CITED

Dorsey v. Old Surety Life Ins. Co., 98 F. 2d 872, 873, 874 (C.C.A. 10, 1938) 4

Crume v. Pacific Mutual Life Ins. Co., 140 F. 2d 182 (C.C.A. 7, 1944), cert. den. 322 U. S. 755 (1944) 4

Miner v. Employers Mutual Liability Ins. Co., 229 F. 2d 35 (C.A.D.C., 1956) 4

Oxford Book Co., Inc. v. College Entrance Book Co., Inc., 98 F. 2d 688 (C.C.A. 2, 1938) 4

Ricker v. General Electric Co., 162 F. 2d 141, 142 (C.C.A. 2, 1947) 5

STATUTES CITED

Copyright Statute, Section 1; 17 U.S.C. Sec. 1 2

Copyright Statute, Section 8; 17 U.S.C. Sec. 8 3

tion to the bond it supplied this customer with attendant documents for use in the replacement of lost securities and also for use in related situations. Petitioner, an insurance broker, contended these insurance forms infringed forms he had copyrighted. (Neither party sold forms; each supplied forms to customers.)

Specifically not deciding the issue whether petitioner was the "author" of the forms he claimed were his (R. 298a; cf. 311a), the District Court held that such insurance forms were not copyrightable subject matter; but, in any event, that petitioner by publication of the forms without notice of copyright had forfeited one copyright; and, further, that even if the copyrights were valid, respondent had not copied any of them and so had not infringed.

The Court of Appeals held that such forms were copyrightable subject matter, but affirmed the holding that the petitioner had published some of the forms of which he claimed to be the author without notice of copyright, and that no copyrights had been infringed. Like the District Court, the Court of Appeals found it unnecessary to determine whether petitioner was the author of the forms he claimed to have written.

Petitioner is an effective insurance salesman (R. 298a). Having found there was a market for blanket bonds for the replacement of lost securities, he sought to monopolize the whole market for such bonds. His means was the Copyright Statute. Assuming (*pro arguendo*) that he authored the forms which he copyrighted, he did not seek to obtain the protection afforded by the Copyright Statute, i.e., printing, reprinting, publishing, copying and vending of his forms (Copyright Statute, Section 1; 17 U.S.C. Sec. 1). On the contrary, he sought to receive "commissions" from anyone using the same basic idea. Petitioner was not interested in protecting the language

of the forms, but rather in having an exclusive on the "plan", as the District Court found (R. 304a-305a, ft. 19). Of course, the idea was old (R. 308a), and petitioner knew it to be old (R. 481a; Ex. EQ, R. 695a).

Petitioner's attempt to obtain the exclusive control of the idea is well illustrated by the National Union Indemnity Co. situation. That company wrote a blanket bond for the replacement of lost securities and attendant papers, which forms were different from petitioner's (Ex. 59, R. 536a, 616a; cf. Ex. 3, R. 234a). Petitioner claimed infringement. Then petitioner offered to settle provided his copyright notice be placed on one paper (not the bond itself) and, more important, he receive insurance "commissions" on all business of this type done by National Union, no matter what language appeared in its forms (Ex. 60, R. 539a, 618a; R. 534a, ff). This attempt to have an exclusive on this type of business is confirmed by petitioner's criticism of the Court of Appeals for failing to protect not only the language, but "the idea" in the insurance form (Petition, p. 10).

ARGUMENT

The petition for the writ is without merit. There is no conflict between the decision below and that of other courts of appeals.

A. A copyright does not subsist in language in the public domain (Copyright Statute, Section 8; 17 U.S.C. Sec. 8) such as language in common use in insurance or other legal forms.

Contrary to petitioner's position, the Second Circuit has not applied a "double standard" to copyright infringement, i.e., one standard to insurance and legal forms, and another to other documents. Rather, the Second Circuit has examined the nature of the insurance art, weighed the desirability of insurance people using the language common to the insurance art, and found it obligatory for them to do so. The use of established in-

surance language, or, as the District Court called it (R. 311a), the "familiar, boiler-plate language of the insurance art", in preparing forms is neither copying nor proof of copying. Both the District Court, which heard the testimony of respondent's employee charged with copying, and the Court of Appeals found absence of copying (R. 307a and ft. 20; Appendix to Petition, pp. 22, 25).

The language of the Court of Appeals at 253 F. 2d 702, 706 (Appendix to Petition, p. 25) summarizes its position:

> "These cases indicate that in the fields of insurance and commerce the use of specific language in forms and documents may be so essential to accomplish a desired result and so integrated with the use of a legal or commercial conception that the proper standard of infringement is one which will protect as far as possible the copyrighted language and yet allow free use of the thought beneath the language. The evidence here shows that Continental in so far as it has used the language of Beardsley's forms has done so only as incidental to its use of the underlying idea. *Chautauqua School of Nursing* v. *National School of Nursing*, 2 Cir., 238 Fed. 151. In so doing it has not infringed."

This language and holding is not only not in conflict but is completely consistent with that in the other Circuits which have passed upon the subject.

Dorsey v. *Old Surety Life Ins. Co.*, 98 F. 2d 872, 873, 874 (C.C.A. 10, 1938);

Crume v. *Pacific Mutual Life Ins. Co.*, 140 F. 2d 182 (C.C.A. 7, 1944), cert. den. 322 U.S. 755 (1944);

Miner v. *Employers Mutual Liability Ins. Co.*, 229 F. 2d 35 (C.A.D.C., 1956);

See also:

Oxford Book Co., Inc. v. *College Entrance Book Co., Inc.*, 98 F. 2d 688 (C.C.A. 2, 1938);

Ricker v. *General Electric Co.*, 162 F. 2d 141, 142 (C.C.A. 2, 1947).

It is not the Second Circuit, but rather petitioner who seeks to set up a "double standard". He maintains that he is free to take any ordinary insurance language and, by copyrighting it, make it his alone. Then, once he has taken it, no one else may use it (respondent has traced petitioner's language in his blanket bonds for lost securities and attendant papers to their sources—none of which is the petitioner). Petitioner wants a "double standard" set up; one standard, to let him take anything and claim it as his, and the other standard, that, when he has taken it, others shall be prevented, not from copying "his" forms taken from the prior insurance art, but from any use of anything in any way similar to what he has taken.

Petitioner's position here demonstrates why he refrained from trying to prove at the trial copying by respondent; and why he refused to let the issue of copying and infringement be determined on a motion for summary judgment where access was admitted.

B. Indirect Infringement.

Petitioner maintains that respondent copied from a third party's forms which in turn were copied from petitioner's form. Since petitioner failed to prove that the third party copied from him (Appendix to Petition, pp. 22-25), the question whether respondent copied from the third party is immaterial and irrelevant.

C. Forfeiture.

Forfeiture of copyright is based on facts. Both the District Court and the Court of Appeals found forfeiture as a fact. Petitioner performed the same acts before he attempted to copyright and at and after the time he claimed publication for purposes of effecting copyright. At each time, he distributed pamphlets (at the first time, without

notice of copyright) containing forms and descriptive matter to all the available people who were likely to be interested in this specialized type of insurance. These people were almost exclusively stock transfer and trust officers in public corporations and in banks.

Conclusion

The points raised by petitioner are without merit. This case is nothing more than a putative author taking an old idea clothed in old "boiler-plate" language, obtaining a copyright, and thereafter trying to maintain a monopoly in the whole idea or "plan" for a type of insurance. After being enjoined from using his "copyright" to effect his monopoly, he complains here that there should be a rule for finding infringement specially set up for him so that he shall have the exclusive right to sell this type of insurance and so receive "commissions" on all such insurance written. We submit this is hardly a matter of general public interest.

The petition for certiorari should be denied.

Respectfully submitted,

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